SUPREME COURT, U. S.

No. 1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTH AMERICAN VAN LINES, INC., *Appellant*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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Pursuant to Rule 16.(4) of the Rules of this Court, Appellant North American Van Lines, Inc., respectfully files this brief in opposition to Appellees' Motions to Affirm.

I.

THE DECISION ERRONEOUSLY REQUIRES APPELLANT TO TRANSPORT CARGO BY ROAD

A. *The Decision Misconstrues The Plain Meaning Of The Language In The Certificate, Particularly The Words, "By Motor Vehicle."*

The initial question is what do the words of Appellant's Sub 30 certificate mean when they state that operations are

authorized as a common carrier by motor vehicle, over irregular routes, between points in Alaska, on the one hand, and, on the other, points in the continental United States.

Appellees contend that the certificate confers the right to transport cargo by highway only. They argue that the Interstate Commerce Commission has "consistently" held that in order to conduct land-sea-land operations a carrier needs additional authority which reads "between points in Alaska". (M.A. 6; I.M.A. 4-5).[1]

Appellees collectively cite *Mollerup Van Lines, Inc., Alaska Grandfather Application,* 95 M.C.C. 338, *aff'd., Andrews Van Lines, Inc. v. United States,* 240 F. Supp. 763 (D.C. Neb. 1965), *aff'd. per curiam,* 382 U.S. 67 (1965); *Aero Mayflower Transit Co., Inc. v. United States,* Civil Action No. IP 64-C-605, June 1, 1966, *aff'd. per curiam,* 387 U.S. 90 (1967); and *United Van Lines, Inc., Ext. — Alaska,* 99 M.C.C. 331 (1965), *aff'd., Andrews Van Lines, Inc. v. United States,* 259 F. Supp. 468 (D.C. Neb. 1966). None of those cases hold what Appellees claim they do, however; nor do they settle the question which Appellant poses to this Court.

The *Mollerup-Andrews* and *Aero Mayflower* cases merely expressed the proposition that a motor carrier could not prove in a "grandfather" case that it had been operating overland if its evidence showed past service by water only. Moreover, the decisions were based on the exclusive jurisdiction of the Federal Maritime Commission over water routes from and to Alaska as it existed in 1961. See, *Andrews,* 240 F. Supp. 763, 767-768. As detailed in Appellant's

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[1] The reference to "M.A." is the Motion to Affirm filed by the Interstate Commerce Commission and the United States of America. The reference to "I.M.A." is the separate Motion to Affirm filed by Intervenors Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc.

Jurisdictional Statement,[2] jurisdiction over joint motor-water service from and to Alaska was transferred to the Interstate Commerce Commission on August 24, 1962 under the provisions of §216 (c) of the Interstate Commerce Act [49 U.S.C. §316 (c)].

The *United-Andrews* case is likewise inappropriate. All that the Commission held was that when a carrier *"not subject"* to the Interstate Commerce Act performs a line-haul ocean or air service between ports in the continental United States and ports in Alaska, it needs additional motor carrier authority "between points in Alaska" to complete the transportation of cargo inland. See *United,* 99 M.C.C. 331, 336-337. The decision is irrelevant here since Appellant *is subject* to the Act and its *entire* joint motor-water service from and to Alaska *is subject* to the exclusive jurisdiction of the Interstate Commerce Commission under §216 (c).

Even if Appellees' citations are considered as approximately relevant, it cannot be said that the Commission has reached settled or consistent conclusions. Appellees fail to cite, for example, the Commission's conflicting decision in *Willett Pipe Line Stringing Corp. Ext. — Alaska,* 84 M.C.C. 542 (1961). There it was urged, as Appellees now urge, that in order to render a through service from and to Alaska a carrier would have to tack or combine its continental states authority with additional "between points in Alaska" authority. The Commission held, however [84 M.C.C. 542, 544]:

> "We conclude that applicants cannot tack their existing authority to transport the involved commodities between points in the United States, except Alaska, with the authority granted below ['between points in

[2] J. S. 15-16.

Alaska'] so as to provide a through service to and from points in Alaska."

The Commission reiterated that conclusion after further hearing. *Willett Pipe Line Stringing Corp. Ext. — Alaska*, 92 M.C.C. 41, 46 (1963). Thus, Appellees proposed remedy for Appellant, that is to acquire additional "between points in Alaska" authority, would be unavailing since it could not be tacked or combined with existing continental states authority for the purposes of rendering a through service. Appellees do not explain the inconsistency of these decisions with their stated position.

Appellees also cite two other cases for the proposition that to substitute ocean service for highway service over a portion of the through route from and to Alaska, a carrier, such as Appellant, requires additional authority to serve "between points in Alaska" (M.A. 6; I.M.A. 6). *Gilbert Carrier Corp. Extension—Kearny*, N. J., 72 M.C.C. 204 (1957); *Substituted Service—Piggyback*, 322 I.C.C. 301, 355 (1964), *reviewed sub nom., American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 18 L. ed 2d 847 (1967).

Neither case involved Alaska or the unique geographic relation of that state to its sister states to the south. Further, if the decisions have any relevance, they add weight to Appellant's claim.

In the *Gilbert* case, the Commission held that motor carriers have authority to render trailer-on-flatcar or substitute rail for motor service between points they are authorized to serve. 72 M.C.C. 204, 206. The Commission made a similar finding in the *Substituted Service* case. At page 355 of that report, the page to which Appellees refer, the Commission held: "***we believe that these carriers should

be limited to the use of TOFC service only between points they are authorized to serve."

Appellant's authority confers the right to conduct operations between points in the continental United States, on the one hand, and, on the other, points in Alaska. Thus, its substituted service between continental ports and Alaskan ports is in fact "between points it is authorized to serve". Its operation is in complete accord with the Commission's pronouncements in the *Gilbert* and *Substituted Service* cases.

In summary, none of Appellees' citations are to the point. The question here is once a motor carrier certificate is issued to serve between points in Alaska, on the one hand, and, on the other, points in the continental United States, without a restriction as to routes, is it to be interpreted as restricted to transportation by highway only? The question has never been adjudicated. It remains unsettled and is appropriate for consideration by this Court.

B. *The Decision Is Based On Extraneous Matters Contrary To Lawful Interpretive Practices.*

Appellees insist that Appellant has twice been clearly denied authority to conduct land-sea-land operations and that it cannot now enhance its franchise in an interpretation proceeding. They claim that appropriate applications by Appellant were filed and disapproved as a part of the *Mollerup-Andrews* and *United-Andrews* decisions (M.A. 3-4; I.M.A. 3).

There is nothing in this record to sustain Appellees' claim. The final order in the Commission's *Mollerup-Andrews* case made no distinction between highway and land-sea-land service with respect to Appellant. The ultimate finding stated only that Appellant was authorized to continue operations "between points in Alaska, on the one

band, and, on the other, points in the continental United States other than Alaska, over irregular routes".[3] The essence of the order, giving effect to the ordinary meaning of the words employed, was to authorize continuation of the dual highway and land-sea-land service which Appellant had conducted under the similarly worded Sub 23TA temporary authority and which the Commission had found to be adequate in *Dean Van Lines, Inc., Extension — Alaska*, 83 M.C.C. 323 (1960).[4]

It cannot be said therefore that the order "clearly" denied Appellant the right to conduct land-sea-land operations. There was absolutely no mention in the ultimate finding of a restriction as to routes. Whatever the Commission may have intended, the words employed authorized "continuation" of Alaska service, "over irregular routes".

Appellees' reference to the *United-Mollerup* case is likewise not only irrelevant, it is misleading. Appellant did not seek land-sea-land authorization in that proceeding as Appellees are well aware. Appellant's application and evidence was related to traffic moving solely by motor vehicle between Canada and Alaska [Comp. Att. Q., p. 20].[5] It is simply untrue that Appellant was denied land-sea-land authority. The service was in no way involved.

Moreover, Appellant's technique of going behind the clear language of the Sub 30 certificate can be employed just as well to prove that the Commission *twice approved* Appellant's land-sea-land operations. Appellant demon-

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[3] 95 M.C.C. 338, 345.

[4] J.S. 9-10.

[5] The reference "Comp. Att." refers to Appellant's complaint in the District Court and the attachments thereto. It was agreed among counsel below that the complaint and the attachments would consitute the administrative record before the District Court.

strated in its Jurisdictional Statement, for example, that in the *Dean* case the Commission reviewed the land-sea-land operations under the Sub 23 TA temporary authority and found them adequate and satisfactory. It can even be shown further that the Commission approved the service again after the Sub 30 certificate was issued.

In *Trans-American Van Service, Inc.—Alaska*, 94 M.C.C. 248 (1963), one of Appellant's competitors sought to extend its household goods rights from and to Alaska, both in the highway and land-sea-land modes. Appellant protested, appeared at the hearing, and presented evidence of its duplicating services. If the Commission viewed Appellant's dual operations as unlawful at that time, it was constrained to so find. *C & H Transportation Co., Inc., Extension*, 94 M.C.C. 711, 715 (1964).[6] The Commission made no such finding, however. It stated only, and by negative inference, approvingly [94 M.C.C. 248, 250]:

> "At the time of the hearing herein, protestant held temporary authority to transport household goods between points in the contiguous states, on the one hand, and, on the other, points in Alaska. Since that time, it has been granted *similar authority* under the Alaska 'grandfather' provisions of the Act. No. MC-107012 (Sub-No. 30), *North American Van Lines, Inc., Alaska Grandfather Application*, in which the examiner's recommended order became effective by operation of law on August 9, 1963. It has engaged extensively in transporting Alaska household goods traffic since 1953" (Emphasis supplied).

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[6] Citing *Worster Motor Lines, Inc. v. United States*, 226 F. Supp. 603 (W.D. Pa. 1963), where the court held: "In the opinion of the Court this, of necessity, requires the Commission to review the scope of authority of each competing carrier which protests an application."

Thus, by going behind the certificate, it is as rational to conclude that the Commission has twice approved North American's land-sea-land service as it is to conclude that the Commission twice disapproved the service. It is for just such a reason that reference to secondary sources is an improper interpretive process in determining the scope of a patently unambiguous certificate. The results can be and often are, as they are here, confused and inconclusive.

Neither the Commission nor the District Court found Appellant's Sub 30 certificate to be anything less than clear and unambiguous. Likewise, Appellees make no such claim in their Motions to Affirm. This Court should therefore declare that it was error for the Commission and the District Court to refer to secondary sources in the process of determining the scope of the Sub 30 certificate. Compare, *Andrew G. Nelson v. United States*, 355 U.S. 554, 557, footnote 3 (1958).

II.

The Action Of The Interstate Commerce Commission Constitutes A Partial Revocation Of Appellant's Certificate Without Due Process of Law

Appellant presents a second issue. It contends that the action of the Interstate Commerce Commission, not being instituted under §212 (a) of the Interstate Commerce Act [49 U.S.C. §312 (a)], constitutes a partial revocation of the Sub 30 certificate without due process of law. Although the situation here has apparently never been before this Court, Appellant urges that the issue be resolved in conformity with *Movers Conference of America v. United States*, 205 F. Supp. 82 (S.D. Calif. 1962).

Appellees do not particularly treat with the issue. Neither mentions the *Movers Conference* case and its analogy to the

existent facts; nor does either deny that the matter is one of first impression for this Court.

Appellees state only that Appellant had no cause to rely on its past operations since, by reference to the underlying *Mollerup-Andrews* and *United Andrews* cases, Appellant was clearly informed that its land-sea-land service had been disapproved (M.A. 7; I.M.A. 4-5). In essence their contention is an attack on the bonafides of Appellant.

Initially, the argument ignores the other acts and omissions of the Commission, over a long period of years, which give rise to the type of "acquiescence" found in the *Movers Conference* case.[7] Second, the argument is dependent on reference to secondary sources. As Appellant has heretofore urged, that interpretive process is inappropriate.

Most important, however, Appellees' argument is contradictory and self-defeating. They claim that it is not necessarily error to go behind an unambiguous certificate and determine its scope by reference to secondary sources [M.A. 6], citing *Andrew G. Nelson, supra,* 558, footnote 3, and *Sims Motor Transport Lines v. United States,* 183 F. Supp. 113, 117 (N.D. Ill.), *aff'd. per curiam,* 362 U.S. 637. Appellees contend that such a procedure is not violative of due process, even if its end result is to restrict a franchise.

Appellant might well agree. But what Appellees overlook or ignore is that both the *Nelson* and *Sims* cases were investigation and revocation proceedings under §212 (a). That is precisely what Appellant urges as error, i.e., that if the Sub 30 certificate was to be revoked or limited, then Appellant was entitled to the protections afforded under that section of the Interstate Commerce Act. Had the Commis-

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[7] Those facts are detailed at length, J. S. 6-12; and summarized, J. S. 25.

sion so proceeded, the protective incidents of an administrative hearing could have been obtained, the meaning and intent of secondary sources could have been fully explored, and Appellant's bonafides could have been proved or disproved by reference to a fairly developed record.

The Commission did not proceed under §212 (a), however. That failure, coupled with its "acquiescence" to Appellant's understanding of the Sub 30 certificate, was violative of due process of law. This Court is asked to so declare.

CONCLUSION

Appellant urged in its Jurisdictional Statement that the questions presented are substantial and that they are of such significance to its interests as to warrant plenary consideration by this Court. Appellees' Motions to Affirm contain nothing to detract from the merits of Appellant's plea.

Respectfully submitted,

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